COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

Nos. 51209/51220/51221

STATE OF OHIO, ex rel. Anthony J. Celebrezze, Jr. Plaintiff-Appellee vs. NORREL E. DEARING, et al (51209) NORTHWAY ENVIRONMENTAL SERVICES, INC., et al [Appeals by: George Liviola (51220) Richard S. Brunsman (51221)] Defendant-Appellants	:	JOURNAL ENTRY AND OPINION
DATE OF ANNOUNCEMENT OF DECISION	:	NOV 13 1986
CHARACTER OF PROCEEDINGS	:	Civil appeals from Court of Common Pleas Case No. 028,657
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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PATTON, J.:

This consolidated appeal arises from a judgment entered by the Court of Common Pleas for Cuyaoga County, which found appellants Norrel E. Dearing, George Liviola, Jr., and Richard S. Brunsman (hereafter "appellants") to have been operating a hazardous waste facility in violation of Chapter 3734 of the Ohio Revised Code, and which imposed civil penalties for such violation. The facts giving rise to this appeal, as disclosed by the record, provide the following:

I. Factual and Procedural Background:

Northway Environnmental Services, Inc. (hereafter "Northway") was an Ohio corporation organized for the purpose of engaging in the business of storing and disposing of industrial wastes. The corporation was formed in early 1980 by appellants and others. Appellants Dearing and Brunsman were officers of the corporation, and appellant Liviola served as "legal adviser." All shared in the profits from the venture.

Northway stored hazardous wastes at various locations in Northeast Ohio during 1980, including 4213 North Bend Road in Ashtabula, Ohio. In the fall of 1980, the appellants made arrangements to begin operations at property located on West 4 Street in Cleveland, Ohio. The property was owned at the time by Koppers, Inc., which was subsequently dismissed from this litigation.

There was conflicting testimony as to when operations commenced at the West 4 Street property. Several witnesses testified that Northway began moving drums and setting up tanks for the storage of hazardous wastes prior to October 9, 1980, and as early as September, 1980. Other witnesses testified that operations at the West 4 Street property did not commence prior to October 9, 1980, and occurred no earlier than October 23, 1980. It is undisputed that for the period of time in question Northway had not obtained a hazardous waste facility installation and operation permit from the Ohio Environmental Protection Agency as was required by law. Appellants did not apply for a permit for the West 4 Street site until April 9, 1981. Appellants never applied for a permit for the North Bend site in Ashtabula.

On June 4, 1981, the State of Ohio, under the authority of the Ohio Attorney General's Office, executed a search warrant at Northway's offices. Subsequently, on June 9, 1981, the State filed a thirteen-count complaint for injunctive relief and civil penalties against the appellants, Northway, and others, alleging violations of Chapters 3704, 3734, 3767 and 6111 of the Ohio Revised Code and regulations adopted thereunder for appellants' storage, treatment, disposal and/or transportation of hazardous wastes at the West 4 Street and North Bend sites. The record indicates that appellants did not file a responsive pleading to the State's complaint.

The trial was bifurcated into a hearing concerning liability and injunctive relief and a hearing regarding civil penalties. On the questions of liability and injunctive relief, a bench trial was held from September 10, 1981 to September 18, 1981. At the close of the week-long trial, which consisted of the testimony of nineteen witnesses and numerous exhibits, the trial court found that, from October 23, 1980 until September 18, 1981, the date of the court's decision, the appellants and Northway had violated R.C. 3734.02(E) by establishing or operating a facility for the storage, treatment, receipt or disposal of hazardous wastes at the West 4 Street site without first obtaining a permit for that facility. The court found a comparable violation for the appellants' and Northway's activities at the North Bend site in Ashtabula, Ohio. The court also found that appellants and Northway had violated R.C. 3734.02(F) by causing or permitting hazardous wastes to be transported to an unlicensed facility, viz., the West 4 Street site. The court found a similar violation with regard to the North Bend site. For these violations, the trial court, in a decision announced on September 18, 1981, enjoined the appellants and Northway from operating or establishing any facility for the receipt, storage, treatment or disposal of hazardous waste or the transportation of any hazardous waste to any site without a permit. The court authorized the Environmental Protection Agency to promptly develop a suitable plan for the

containment and removal of any existing hazardous waste at the respective facilities.

Over the next four years, various injunctive and contempt orders were entered against the appellants and Northway, attempting to achieve the clean-up of the West 4 Street and North Bend sites. (The various orders were not contained in the record transmitted for this appeal.) An evidentiary hearing was conducted in April, 1984, after which the trial court concluded that appellants and Northway were not assisting with the clean-up of the respective facilities in an expeditious manner. Contempt orders were issued.[1]

On October 10, 1985, the trial court conducted a hearing to assess civil penalties against the appellants pursuant to R.C. 3734.13 for their violations of R.C. Chapter 3734. The appellants did not present any evidence at the hearing. The court made findings as to the income earned by each of the appellants for the period of time in which the respective faciities were operated in violation of law, from October 23, 1980 until September 18, 1981. The court determined that the appellants had been recalcitrant in complying with the clean-up orders, although it

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[1] It should be noted that on or about February 1, 1983, Northway Environmental Services, Inc. filed for bankruptcy, pursuant to Chapter 7, in the United States Bankruptcy Court, Northern District of Ohio, Case Number B83-108-Y.

was disclosed that the North Bend clean-up was complete and that the West 4 Street clean-up was between ninety and ninety-five percent complete as of October 10, 1985. The court found that the State had been required to devote extraordinary time and resources in order to enforce the court's clean-up directives. The court also determined that the appellants had made a calculated business decision to disregard the statutory requirements for licensing hazardous waste operations. Based on the appellants' varying degrees of responsibility, the court assessed civil penalties against each appellant and Northway as follows:

Richard S. Brunsman	$ 75,000.00
Norrel E. Dearing	105,000.00
George Liviola, Jr.	115,000.00
North Environmental Services, Inc.	327,000.00

An additional judgment of $36,750 was assessed against Norrel E. Dearing and against George Liviola, Jr. each. The court's findings of fact, conclusions of law, and judgment were journalized on October 25, 1985.

On November 22, 1985, appellant Norrel E. Dearing filed a Notice of Appeal, Case No. 51209. On November 25, 1985, appellant George Liviola, Jr. filed a Notice of Appeal, Case No. 51220. Also on November 25, 1985, appellant Richard S. Brunsman filed a Notice of Appeal, Case No. 51221.

On December 4, 1985, this Court sua sponte consolidated the respective appeals.

Thereafter, assignments of error and briefs were filed on behalf of appellant Dearing and appellant Liviola.

II. Relevant Statutory and Administrative Rule History.

Before addressing the merits of the individual assignments of error raised by the appellants, it is important to review the history of the relevant statutes and administrative rules which are in issue in this appeal. Effective March 19, 1979, R.C. 3734.02(E) provided:

> No person shall establish or operate a hazardous waste storage, treatment, or disposal facility, or use a solid waste disposal site or facility for the storage, treatment, or disposal of any hazardous waste, without a hazardous waste facility installation and operation permit from the director. ***

R.C. 3734.02(F) provided:

> No person shall store, treat, or dispose of hazardous waste anywhere, regardless whether generated on or off the premises where such waste is stored, treated, or disposed of, or transport or cause to be transported any hazardous waste to any other premises, except at or to a hazardous waste storage, treatment, or disposal facility operating under a permit issued under this chapter, ...

R.C. 3734.05(B) provided:

> Each person who proposes to establish or operate a hazardous waste storage, treatment, or disposal facility shall submit an application for an installation and operation permit and accompanying detail plans, specifications, and information to the environmental protection agency at least one hundred eighty days before the proposed beginning of operation of the facility.

Although R.C. 3734.12 authorized the director of environmental protection to adopt, modify, suspend, or repeal administrative regulations concerning the management of hazardous waste, it does not appear that such authority was exercised until April 15, 1981.

Effective October 9, 1980, the Ohio General Assembly amended Chapter 3734 of the Revised Code, setting forth a detailed statutory scheme for the licensing of hazardous waste facilities. Revised Code 3734.02(E) provided, in relevant part:

> No person shall establish or operate a hazardous waste facility, or use a solid waste facility for the storage, treatment, or disposal of any hazardous waste, without a hazardous waste facility installation and operation permit from the director. The permit shall be issued subject to approval by the hazardous waste facility approval board in accordance with section 3734.05 of the Revised Code ...

Revised Code 3734.02(F) provided, in relevant part:

> No person shall store, treat, or dispose of hazardous waste anywhere, regardless whether generated on or off the premises where the waste is stored, treated, or disposed of, or transport or cause to be transported any hazardous waste to any other premises, except at or to:
>
> (1) A hazardous waste facility operating under a permit issued under this chapter; ***

The procedure for obtaining a waste facility permit was set forth in R.C. 3734.05. With respect to the issues raised in this appeal, the October, 1980 amendments contained a "grandfather clause" for qualifying hazardous waste facilities. Revised Code 3734.05(D) provided, in relevant part:

> (1) Upon receipt of a completed application, the [hazardous waste facility approval] board shall issue a hazardous waste facility installation and operation permit for a hazardous waste facility subject to the requirements of divisions (C)(6) and (7) of this section and all applicable federal regulations if the facility for which the permit is requested:
>
> > (a) Was in operation immediately prior to the effective date of this division; ***

As noted, the effective date of the amendment was October 9, 1980.[2]

Pursuant to its authority to promulgate administrative rules, the director of environmental protection adopted rules governing the management of hazardous wastes on April 15, 1981. Of relevance to this appeal, Ohio Adm. Code 3745-50-10(A)(18) defined an "existing hazardous waste facility" or "existing facility" to be:

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[2] The current version of this "grandfather clause," effective October 31, 1984, specifically qualifies any hazardous waste facility that "was in operation immediately prior to October 9, 1980; ***"

> ... a facility which was in operation, or for which construction had commenced, on or before November 19, 1980. Construction had commenced if:
>
> > (a) The owner or operator has obtained all necessary federal, state, and local preconstruction approvals or permits; and either
> >
> > (b) A continuous physical, or-site (sic.) program has begun, or
> >
> > (c) The owner or operator has entered into contractual obligations -- which cannot be cancelled or modified without substantial loss -- for construction of the facility to be completed within a reasonable time.

On April 15, 1981, the director also enacted Ohio Adm. Code 3745-50-40, entitled "Submittal of Hazardous Waste Permit Applications." This rule provided, in pertinent part:

> (A) Existing facilities
>
> (1) No later than thirty days after the effective date of this rule, all owners and operators of existing hazardous waste facilities shall file "Part A" of the permit application.
>
> (2) At any time after the effective date of the "Phase II" hazardous waste rules, the owner or operator of a hazardous waste facility may be required by the director to file "Part B" of the permit application. Such owner or operator shall be allowed six months from the date of notification to file such application.
>
> (3) Failure to timely file a required "Part B" of the permit application or to provide in full the information required by such application is grounds for termination of interim status. ***

Ohio Adm. Code 3745-50-10 was amended on May 22, 1981. The amended version deleted the definition of "existing hazardous waste facility" or "existing facility." Ohio Adm. Code 3745-50-10(A)(22) defined "facility" or "hazardous waste facility" to be:

> ... all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations thereof).

In addition, Ohio Adm. Code 3745-50-10(A)(35) provided that "in operation" referred to "a facility which is treating, storing, or disposing of hazardous waste."[3]

The former Ohio Adm. Code 3745-50-40 was modified in the May 22, 1981 amendment. The revised rule provided:

> (A) Hazardous waste facilities in operation immediately prior to October 9, 1980:
>
> (1) No later than April 9, 1981, all owners and operators of hazardous waste facilities in operation immediately prior to October 9, 1980 shall file "Part A" of the permit application.
>
> (2) At any time after the effective date of the "Phase II" hazardous waste rules applicable to such facility, the owner or operator of the hazardous waste facility may be required by the director to file "Part B" of the permit applica-

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[3] The May, 1981 Administrative Code sections quoted are identical to the current definitions.

> tion. Such owner or operator shall be allowed six months from the date of notification to file such application.

With this factual and statutory background, it is appropriate to review the respective assignments of error.

III. Appellants' Assigned Errors

For his appeal, appellant Dearing assigns three errors for review:

> I. THE FINDING OF THE COURT BELOW THAT THE FACILITY WAS NOT IN OPERATION PRIOR TO OCTOBER 9, 1980, WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> II. THE COURT ERRED IN FINDING THAT THE STATE COULD PROCEED AGAINST THE DEFENDANTS NOTWITHSTANDING AN ADMINISTRATIVE RULE DEPRIVING THE STATE OF JURISDICTION.
>
> III. THE TRIAL COURT ERRED IN ITS DETERMINATION OF THE AMOUNT OF CIVIL PENALTY AWARDED AGAINST APPELLANT AND IN APPLYING THE UNITED STATED (SIC.) EPA CIVIL PENALTY POLICY CRITERIA IN A MANNER THAT WAS PREJUDICIAL TO THE APPELLANT, CREATED AN EXCESSIVE CIVIL PENALTY AWARD AND WAS BASED UPON ERRONEOUS FINDINGS OF FACT AND CONCLUSIONS OF LAW CONTAINED IN ITS OCTOBER 24, 1985 DECISION.

For his appeal, appellant Liviola adopts Dearing's assigned errors and adds a fourth:

> IV. THE TRIAL COURT ERRED CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW THAT THE APPELLANT, GEORGE LIVIOLA, JR., WAS AN OFFICER OF NORTHWAY ENVIRONMENTAL SERVICES, INC. AND THAT HE WAS ACTIVELY ENGAGED IN THE DAY TO DAY MANAGEMENT OF NORTHWAY ENVIRONMENTAL

SERVICES, INC; AND THAT AS A CONSEQUENCE THEREOF, THE APPELLANT, GEORGE LIVIOLA, JR., WAS RESPONSIBLE FOR THE ACTIVITIES OF NORTHWAY ENVIRONMENTAL SERVICES, INC.

The assigned errors will be discussed with regard to all three appellants, where appropriate, and with regard to a specific appellant, where necessary.

A. For their first assignment of error, appellants contend that the trial court erred in concluding that the West 4 Street facility was not in operation prior to October 9, 1980. Appellants argue that evidence presented at the September, 1981 liability and injunctive relief hearing established that the aforementioned facility was in operation prior to October 9, 1980 and that, with Northway's filing of its application on April 9, 1981, Northway was entitled to receive an operation permit under the "grandfather clause" of R.C. 3734.05(D). Accordingly, appellants conclude that the trial court's finding of Chapter 3734 violations with respect to the West 4 Street site was against the manifest weight of the evidence.[4] This contention is without merit.

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[4] It is undisputed that neither Northway nor the appellants submitted an application for the North Bend site as had been done for the West 4 Street site in April, 1981. By failing to submit said application, the North Bend site could not qualify under the "grandfather clause" of R.C. 3734.05(D). It follows that the trial court's finding of violations of R.C. 3734.02(E) and 3734.02(F) for the North Bend site are unassailable under this assignment of error.

In C. E. Morris Company v. Foley (1978), 54 Ohio St. 2d 279, the court held:

> Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.

In Seasons Coal Company, Inc. v. City of Cleveland (1984), 10 Ohio St. 3d 77, the court observed that in reviewing the manifest weight of the evidence, a court of appeals should be guided by a presumption that the findings of the trier of fact were correct. Id., at 80. This Court has previously stated:

> The mere fact that a reviewing court differs from a determination of the trial court is not sufficient to reverse a case on the weight of the evidence; rather, the determination must be so manifestly against the weight of the evidence as to shock the conscience by permitting it to stand.

Cannell v. Bulicek (1983), 8 Ohio App. 3d 331, 336.

In the instant case, the trial court heard testimony from nineteen witnesses and took over one hundred items into evidence during the course of the week-long liability trial in September, 1981. There was testimony presented as to some "preparatory activities" that took place on the West 4 Street property allegedly as early as Labor Day, 1980. There was also testimony

adduced that some drums were brought onto the property after Labor Day but before October 23, 1980. The trial court heard conflicting testimony concerning the storage of hazardous wastes prior to October 9, 1980. The trial court found that, in the transition from Koppers, Inc.'s use of the property to Northway's use of the property, Northway did not commence its storage operations until October 23, 1980, two weeks after the October 9 date required to qualify under the "grandfather clause," R.C. 3734.05 (D)(1)(a). We cannot say that the trial court's conclusions are not supported by competent, credible evidence.

Appellants argue that the trial court erroneously concluded that operations did not commence until October 23, 1980 because appellants did not have "permission" until that date to enter onto the premises. We are not persuaded. The findings by the trial court indicate that the activities conducted by Northway at that time consisted of testing the tanks to insure that they would be suitable for their intended use. We do not believe that this is equivalent to "treatment, storage, or disposal" in order for the facility to qualify as being "in operation" as defined under the Administrative Code. Ohio Adm. Code 3745-50-10(A)(35).

Accordingly, we conclude that the trial court's finding that the West 4 Street facility was not "in operation" prior to October 9, 1980 is supported by competent credible evidence and is not against the manifest weight of the evidence.

The first assignment of error is without merit.

B. For their second assignment of error, appellants argue that a conflict in administrative rules deprived the trial court of subject matter jurisdiction. This contention is not well taken.

The appellants' argument in this assignment is premised on an apparent conflict in the administrative rules concerning the "grandfather clause" of R.C. 3734.05(D). Under the statute as enacted, a hazardous waste facility would qualify under the "grandfather clause" only if the facility were in operation prior to the effective date of the statute, October 9, 1980. Appellants argue that under the administrative regulations which were promulgated in April, 1981, a facility could qualify under the "grandfather clause" if the facility were in operation before November 19, 1980. Ohio Adm. Code 3745-50-10(A)(18). Appellants argue that if the State had followed its own rules, then Northway would have been eligible to receive a hazardous waste facility permit. From this argument, appellants conclude that the trial court was without subject matter jurisdiction. Appellants' argument is not persuasive.

Jurisdiction has been defined as the power to hear and determine a cause of action. See, Loftus v. The Pennsylvania Rd. Co. (1923), 107 Ohio St. 352, 356. Revised Code 3734.10

vests in the common pleas court the jurisdiction to hear cases such as the one at bar. Revised Code 3734.10 provides, in relevant part:

> The attorney general ... shall prosecute to termination or bring an action for injunction against any person who has violated, is violating, or is threatening to violate any section of this chapter, rules adopted under this chapter, or permits or orders issued under this chapter. The court of common pleas in which an action for injunction is filed has the jurisdiction to and shall grant preliminary and permanent injunctive relief upon a showing that the person against whom the action is brought has violated, is violating, or is threatening to violate any section of this chapter, rules adopted thereunder, or permits or orders issued under this chapter. The court shall give precedence to such an action over all other cases.

Thus, the trial court in this case had subject matter jurisdiction over this controversy.

We acknowledge that there does appear to be a conflict between the effective date of the "grandfather clause" as set forth in the statute as opposed to the date set forth in the subsequent administrative rules. While appellants are correct in noting that an agency is generally required to follow its own regulations, see, State ex rel. Consumers League of Ohio v. Ratchford (1982), 8 Ohio App. 3d 420, 422, it is also well settled

that, where an administrative agency promulgates rules and regulations governing its activities and procedure, such rules are valid and enforceable unless they are in conflict with statutory requirements covering the same subject matter. See, State ex rel. DeBoe v. Industrial Commission of Ohio (1954), 161 Ohio St. 67, paragraph one of the syllabus. Accordingly, notwithstanding the apparent conflict between statute and administrative rule, the former would necessarily prevail over the latter. However, this conflict in no way divests the trial court of jurisdiction over this controversy.

Thus, while the appellants may have believed that they could qualify under the "grandfather clause" so long as the West 4 Street facility was "in operation" prior to November 19, 1980, the governing statute required that the facility be in operation before October 9, 1980. Since the record supports the trial court's findings that said facility was not in operation by October 9, 1980, the trial court did not commit error in finding Chapter 3734 violations.

The second assignment of error is not well taken.

C. For their third assignment of error, appellants contend that the trial court erred in assessing civil penalties against the appellants by misapplying the criteria set forth in the United States Environmental Protection Agency policy. Appellants

dispute several findings of fact and conclusions of law as found by the trial court. We conclude that the trial court's conclusions are supported by the evidence and that the record in this case supports the award of civil penalties against these appellants as determined by the trial court. Accordingly, the third assignment of error is without merit.

After the trial court found violations of Chapter 3734 in September, 1981, the trial court ordered the appellants to discontinue their operations and to assist in the clean-up. Subsequently, on October 10, 1985, the trial court conducted a hearing to assess civil penalties against the appellants for the said violations, pursuant to R.C. 3734.13(C). In determining the appropriate penalty, the court considered as a guideline the criteria listed in the United States Environmental Protection Agency policy. Factors considered by the court included: (1) the economic benefit gained by noncompliance; (2) the recalcitrance, defiance, or indifference to the law; (3) the harm or threat of harm to the environment; and (4) any extraordinary costs incurred in enforcement of hazardous waste laws. See, e.g., State, ex rel. Brown v. Dayton Malleable, Inc. (1982), 1 Ohio St. 3d 151, 153; State, ex rel. Brown v. Howard (1981), 3 Ohio App. 3d 189, 191.

At the outset, we reiterate that we are guided by a presumption that the findings of the trier of fact were correct. Seasons Coal Company, Inc. v. City of Cleveland, supra. We may

not substitute our judgment for that of the trial court, even if we hold a different opinion concerning the credibility of the witnesses and evidence submitted to the trial court. So long as the trial court's findings in assessing the civil penalties are supported by some competent, credible evidence, then our inquiry is at an end. See, C. E. Morris Co. v. Foley Construction Co., supra.

Appellants argue that the trial court erred in assessing civil penalties for the period of illegal operations from October 23, 1980 until September 18, 1981. Appellants maintain that the trial court should have considered operations from October 23, 1980 until June 4, 1981, the date on which the State "raided" Northway's operations. While it is obvious that Northway's operations were subject to greater State regulation after June 4, 1981 than before, we cannot say that the trial court improperly assessed a civil penalty for the period from June 4, 1981 through September 18, 1981, during which time Northway continued to operate in violation of the law, although it was not adjudicated as such until September 18, 1981. Moreover, it is settled law in Ohio that "actively litigating" a claimed entitlement to government authorization of conduct requiring governmental approval does not preclude the imposition of sanctions allowed by law for engaging in the conduct without such authorization. See, Noernberg v. Brook Park (1980), 63 Ohio St. 2d 26, 29; State, ex

rel. Celebrezze v. J. V. Peters & Co., Inc. (Apr. 19, 1985), Geauga App. No. 1088, slip op. at 5. Accordingly, we find no error in assessing penalties for operations from October 23, 1980 until September 18, 1981.

Appellants also argue that in determining the economic benefit gained from noncompliance, the trial court erred in considering the appellants' income for the years 1980 and 1981 rather than limiting its analysis to income earned from October, 1980 until June, 1981. The record discloses that, at a hearing held on April 23, 1984, each appellant testified to his respective income for the years in question. (Tr. 43-44, 70, 84). Moreover, the record discloses that appellants answered interrogatories concerning their income for the period of time in question at an earlier stage in this litigation (although those interrogatories were not included in the record transmitted for this appeal). At the civil penalty hearing in October, 1985, the appellants declined to put on any evidence. At that hearing, the trial court had before it State's Exhibit Six, which summarized the incomes for the appellants for the two years in which Northway Environmental Services, Inc. was in operation, viz., 1980 and 1981. In light of this evidence, we cannot say that the trial court's determination of the economic gains derived from the appellants' noncompliance is not supported by competent credible evidence. C. E. Morris Co. v. Foley Construction Co., supra. Similarly, the court's

finding that appellants were "competent businessmen" is not against the manifest weight of the evidence.

Appellants maintain that civil penalties were improperly assessed for recalcitrance insofar as the appellants allegedly relied in good faith on the administrative rules which suggested that facilities in operation before November 19, 1980 would qualify under the "grandfather clause." While this contention has no merit for purposes of determining liability for statutory violations, see discussion supra., it deserves greater consideration in determining the appropriate penalty for said violations. Initially, we are dubious of appellants' claim of "good faith" reliance on the administrative regulations since, in light of the statutory history of Chapter 3734, an appropriate permit was required to be filed under the statute in effect in 1979 and under the new licensing scheme effective October 9, 1980. Our review of the regulations indicates that the seemingly conflicting regulation relied upon by appellants, stating the date of November 19, 1980, was not enacted until April 15, 1981, over five months after the Northway operations commenced and almost one week after Northway submitted a permit for the West 4 Street site. Additionally, we are mindful of the fact that the maximum penalty which could have been imposed for appellants' violations was $13,200,000 for each defendant, that the State sought total penalties of $327,000 for each defendant and that the penalty actually

assessed against each appellant was substantially less than that sought by the State. Accordingly, we conclude that the penalties imposed were not excessive in this respect.

Appellants further argue that the finding of recalcitrance was erroneous since by October, 1985 the West 4 Street clean-up was between ninety and ninety-five percent complete. The trial court had before it evidence indicating that the appellants failed to clean up the facility in the prompt manner ordered by the trial court in September, 1981. The court also noted that the appellants had exhibited varying degrees of recalcitrance in complying with the clean-up directive over the ensuing four years. We do not believe that appellant Dearing's compliance with the trial court's discovery orders is sufficient to offset the trial court's finding of recalcitrance on the part of Dearing in cleaning up the property in a timely manner. Based on this record, we cannot say that the trial court misappplied the relevant criterion.

Appellants next attack the trial court's findings concerning the potential damage to the environment caused by appellants' illegal operations. The trial court found that the precise damage to the environment and to residents living in the area of appellants' illegal operations was unknown and perhaps unknowable. The court emphasized that the primary harm in this case was the appellants' disregard of the statutory regulation of

this hazardous business enterprise. While the evidence adduced suggested that as of October, 1985 the West 4 Street site clean-up operation was almost complete, this fact in no way detracts from the potential dangers arising from the sluggish removal of hazardous wastes on the property from 1980 to 1985. We agree with the trial court's conclusion that the appellants' disregard of the statutory licensing scheme poses a serious risk of harm. Failure to penalize such conduct would undermine the entire regulatory scheme and would set a dangerous precedent for others entering this field. See, State, ex rel. Brown v. Howard, supra., at 191.

On the matter of extraordinary costs incurred by the State in enforcing the hazardous waste laws, appellants contend that the State performed services it was already required to do and that the State did little more than merely "supervise" the clean-up operations. The record reveals that the Ohio Environmental Protection Agency expended an inordinate amount of time and expense in the clean-up of the Northway operations from 1981 until 1985. Testimony presented by the State disclosed that approximately eight hundred work hours were required during the course of the clean-up operations. The trial court observed that the amount of time required to clean up the Northway facilities necessarily limited the State's ability to monitor potential environmental dangers elsewhere. We cannot say that the trial court

misapplied the "extraordinary expenses" criterion under the facts of this case.

Finally, appellants contend that the trial court arbitrarily pierced the corporate veil in assessing civil penalties against the appellants individually. Appellants cite as authority for this proposition the case of State, ex rel. Brown v. Dayton Malleable Inc., supra. A review of that decision does not reveal any basis for concluding that civil penalties may not be assessed against individuals.[5] Under the relevant enabling statute in this case, R.,C. 3734.13(C), the trial court is authorized to impose a civil penalty upon the person found to have violated Chapter 3734. See also, Centennial Ins. Co. v. Vic Tanny Int'l. (1975), 46 Ohio App. 2d 137, 141 (noting that corporate officers may be held personally liable for fraud even though the corporation may also be liable). Accordingly, it was not error to assess civil penalties against the appellants individually for their participation in the Northway operation.

In sum, we conclude that the trial court's findings of fact and conclusions of law are supported by competent, credible

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[5] Appellants also cite to State, ex rel. Brown v. K & S Circuits, Nos. 79-950, Montgomery C.P. 83184. However, appellants have not included a copy of that opinion in their brief.

evidence. We also believe that the trial court properly applied the relevant criteria in determining the appropriate civil penalty to be assessed against each appellant. It follows that the third assignment of error is without merit.

D. For the fourth assignment of error, appellant Liviola contends that the trial court committed reversible error in concluding that Liviola was a corporate officer of Northway Environmental Services, Inc. and in finding that Liviola was engaged in the day-to-day management of the enterprise. This contention is without merit.

Initially, we note that appellant Liviola never filed a responsive pleading to the complaint filed against him in this matter in June, 1981. Civil Rule 8(D) provides, in pertinent part:

> Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.
> ***

See, e.g., Farmers & Merchants State & Savings Bank v. Raymond G. Barr Enterprises, Inc. (1982), 6 Ohio App. 3d 43. Thus, under the Civil Rules, appellant Liviola's failure to deny his alleged involvement in Northway constitutes an admission of such involvement.

Moreover, even if we were convinced that appellant Liviola was not a "corporate officer" of Northway, the record in this case is replete with evidence of Liviola's involvement in the operation. The trial court heard testimony that Livola was the "legal adviser" and "legal department" for Northway. Appellant Liviola made arrangements for the transfer of the West 4 Street property in Cleveland from Koppers, Inc. to Northway. Liviola owned the North Bend site in Ashtabula, Ohio. The testimony disclosed that Liviola advised Northway how it should proceed under the regulatory scheme of the relevant statutes. There was also evidence before the trial court indicating that appellant Liviola had not made any significant effort to comply with the trial court's clean-up order. The record does not indicate that appellant ever sought to be relieved from the trial court's order to clean up the facilities prior to the entry of the civil penalty against him.

Based on this record, we cannot say that the trial court's findings are not supported by competent, credible evidence. C. E. Morris Co. v. Foley Construction Co., supra. Accordingly, the trial court did not err in assessing a civil penalty against appellant Liviola.

The fourth assignment of error is not well taken.

The judgment of the trial court is affirmed.

It is ordered that appellee recover of appellants its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARKUS, C.J.,

PARRINO, J. CONCUR.

JUDGE
JOHN T. PATTON

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.